# NKM Properties Sdn Bhd v Rakyat First Merchant Bankers Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 03–39–91
JEMURI SERJAN CJ (BORNEO), MOHAMED YUSOFF AND EUSOFF CHIN SCJJ
27 JUNE 1992

***Land Law** — Auction — Fixing reserve price of land — Previous auctions unsuccessful — Application to fix reserve price for next auction — Reserve price not to be above that fixed for last auction — National Land Code 1965 s 259(2)(c)*

In this case the High Court had ordered that a piece of land charged to the respondent be sold by public auction under the National Land Code 1965 ('the Code'). Eight auctions were held but they were not successful because there were no bidders. The reserve price at the last auction was $4.63m. The respondent applied to the senior assistant registrar ('the SAR') to fix a new reserve price and the next date of auction sale. The respondent produced a valuation report which showed the estimated open market value of the land to be $5.7m and the estimated forced sale value to be $4.02m. The SAR fixed the reserve price at $5m. The appellant appealed to the judge-in-chambers who confirmed the order of the SAR. The appellant appealed to the Supreme Court and the respondent filed a notice of cross-appeal.

**Held**, allowing both the appeal and the cross-appeal:

(1) It is clear from s 259(2)(c) of the Code that in the absence of any bid at or above the reserve price, the registrar shall withdraw the land from the sale and direct that the land be put up for auction at a subsequent date either at the same or at a reduced reserve price. The 'same' reserve price referred to is the reserve price at the latest sale at which there had been no bidder. The law requires that the reserve price fixed for the next auction cannot be above the reserve price fixed for the last auction.

(2) Following the requirements of s 259(2)(c) of the Code, the SAR is not authorized to fix the reserve price above the reserve price for the last auction which was unsuccessful. The reserve price for the next auction should not be higher than $4.63m.

(3) The learned judge in confirming the order of the SAR had failed to construe s 259(2)(c) of the Code correctly.

**[Bahasa Malaysia summary**

Di dalam kes ini Mahkamah Tinggi telah memerintahkan sekeping tanah yang digadai kepada penentang dijual melalui lelong awam di bawah Kanun Tanah Negara 1965 ('Kanun itu'). Lapan kali lelong diadakan tetapi semua tidak berhasil kerana tiada sesiapa membuat tawaran. Harga rizab pada masa lelong kali terakhir ialah $4.63 juta. Penentang telah memohon kepada penolong kanan pendaftar ('PKP')

untuk menetapkan harga rizab yang baru dan tarikh lelong yang berikut. Penentang telah mengemukakan laporan penilaian yang menunjukkan anggaran nilai pasaran terbuka tanah itu ialah $5.7 juta dan nilai jualan paksa tanah itu ialah $4.02 juta. PKP menetapkan harga rizab pada $5 juta. Perayu telah merayu kepada hakim di dalam kamar yang telah mengesahkan perintah PKP itu. Perayu telah merayu kepada Mahkamah Agung dan penentang telah memfailkan notis rayuan balas.

**Diputuskan**, membenarkan kedua-dua rayuan dan rayuan balas itu:
(1) Adalah jelas daripada s 259(2)(c) Kanun itu bahawa semasa ketiadaan sebarang tawaran pada atau lebih daripada harga rizab, pendaftar hendaklah menarik balik tanah itu dari penjualan itu dan mengarahkan tanah itu ditawarkan untuk dilelong di suatu tarikh kemudian pada harga rizab yang sama atau yang dikurangkan. Harga rizab yang 'sama' yang dirujuk itu ialah harga rizab di penjualan yang terbaru di mana tidak terdapat sesiapa membuat tawaran. Undang-undang mengkehendaki harga rizab yang ditetapkan untuk lelong yang berikut tidak boleh melebihi harga rizab bagi lelong kali terakhir.
(2) Mengikut kehendak s 259(2)(c) Kanun itu, PKP tidak diberi kuasa untuk menetapkan harga rizab yang lebih tinggi daripada harga rizab di lelong kali terakhir yang tidak berhasil. Harga rizab untuk lelong yang berikut itu tidak boleh melebihi $4.63 juta.
(3) Hakim yang arif dalam mengesahkan perintah PKP itu telah gagal mentafsirkan s 259(2)(c) Kanun itu dengan betul.]

**Cases referred to**
1 *Co-operative Central Bank Ltd v Gnanasegaran* KL O/S No S5–31–837–87 (unreported) (refd)
2 *Pacific Bank Bhd v Wong Kum Meng* [1991] 1 MLJ 248 (not folld)

**Legislation referred to**
National Land Code 1965 s 259(2)(c)

**Appeal from**: Civil Decision OS No F32/82 (High Court, Kuala Lumpur)

*MS Murthi* (*Murthi & Partners*) for the appellant.
*Benjamin John Dawson* (*Nik Hussain & Partners*) for the respondent.

*Cur Adv Vult*

**Eusoff Chin SCJ** (delivering the judgment of the court): On 7 December 1982, the High Court had ordered that the land held under CT No 1478, Lots 499 and 656 Mukim of Seremban which was charged to the respondent be sold by public auction under the National Land Code 1965 ('the Code'). Subsequent thereto, eight auctions were held on dates and at reserve prices as follows:

| Date | Reserve price (in million) |
|---|---|
| 4 September 1987 | $8.25 |
| 13 January 1988 | $7.4 |
| 5 April 1988 | $6.6 |
| 17 October 1988 | $6.0 |
| 4 July 1989 | $5.7 |
| 30 November 1989 | $5.3 |
| 23 November 1990 | $4.8755 |
| 12 June 1990 | $4.63 |

These auctions were not successful because there were no bidders.

The respondent took out a summons for direction for the senior assistant registrar ('SAR') to fix a new reserve price and the next date of auction sale. The respondent produced a valuation report dated 12 September 1990 prepared by a licenced land valuer which showed the estimated open market value of the land to be $5.7m and the estimated forced sale value to be $4.02m.

On 18 January 1991, the SAR heard the application and fixed the reserve price at $5m. The appellant appealed to the judge-in-chambers who on 20 March 1991 confirmed the SAR's order. The learned judge then issued a certificate under O 56 r 2(2) of the Rules of the High Court 1980 that he did not wish to hear further arguments in open court. The appellant appealed to the Supreme Court, and the respondent filed a notice of cross-appeal.

Both the learned counsel before the Supreme Court agreed that the main issue is the interpretation of s 259(2)(c) of the Code, namely, whether the reserve price for the subsequent auction, can be fixed higher than the reserve price of the last unsuccessful auction sale which took place on 12 June 1990.

It was contended by the appellant's learned counsel that the SAR should have fixed the reserve price at $5.7m because that is the estimated open market value of the land. On the other hand, learned counsel for the respondent was of the view that since there was no bidder at the last auction sale at the reserve price of even $4.6m, the figure for the forced sale value of $4.02m should be taken.

Section 259(1) and (2) of the Code states:

> Procedure at sale.
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> (1) Every sale pursuant to an order under section 256 shall take place under the direction of an officer of the Court, but this sub-section shall not prevent the Court from taking the assistance thereat of any licensed auctioneer.
> (2) The officer under whose direction the sale takes place shall —
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> (a) receive the bids (including any bid by or on behalf of the chargee);
> (b) settle summarily any question arising in the course of the proceedings;
> (c) in the absence of any bid at or above the reserve price, withdraw the land or lease in question from the sale, direct that it be put up for auction on a subsequent date, *either at the same or at a reduced reserve price*, and see that the subsequent sale is publicly advertised in the like manner ...; and

(d) subject to paragraph (c), declare the sale concluded in favour of the highest bidder. (Emphasis added.)

We note that the order for sale of land made by the court under s 256 of the Code must, under s 257(1)(d) of the Code, 'require the Registrar of the Court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in question'. Section 258 of the Code imposes a duty on the registrar of the court to see to it that everything that needs to be done before the auction sale takes place is properly done. It is argued by learned counsel for the appellant that at the auction sale the registrar is not physically present, but that the sale is conducted by a bailiff of the court assisted by a licensed auctioneer. He is not certain whether it is the bailiff who is 'the officer under whose direction the sale takes place'. Having perused the relevant provisions under the Code we are of the view that the SAR is the officer under whose direction the sale takes place, and the bailiff being the junior officer though physically present at the sale, acts under the direction of the registrar. The officer under whose direction the sale takes place cannot be the judge because a judge is not an officer under art 132(3)(c) of the Federal Constitution. Though the bailiff may conduct the auction sale with the assistance of a licensed auctioneer, if any question arises at the sale, the bailiff has to refer the question to the SAR for decision. It sometimes happens that for convenience of parties and bidders, a sale is conducted at the land office in whose district or sub-district the land is situated. In such case, if a question arises at the sale, the bailiff may communicate with the SAR by telephone.

The question before us concerns the meaning of the words 'either at the same or at a reduced reserve price'.

The learned counsel for the appellant brought to our attention the decision of NH Chan J in *Co-operative Central Bank Ltd v Gnanasegaran.*[1] There, the land was to be put up for auction for the third time. The new valuation report for this third sale stated that the current market price was $210,000. At the second auction sale the reserve price was $220,000. The SAR fixed $178,000 as the reserve price for the third auction sale. The judge decided that 'the registrar cannot unilaterally reduce the reserve price without paying regard to the market value. If the market value is reduced by the onslaught of recession, then the registrar can reduce the reserve price to one which is equal to the current market value'.

In *Pacific Bank Bhd v Wong Kum Meng,*[2] the land had been put up for auction three times at the reserve prices of $400,000, $350,000 and $300,000 respectively. There were no bidders. The SAR fixed $300,000 as reserve price for the fourth auction but the defendant appealed to the judge to increase the reserve price to $350,000. Abdul Razak J, holding that the words 'same reserve price' could refer to any of the reserve prices at the earlier sales, fixed the reserve price at $350,000 for the fourth auction. He was of the view that the market value of a particular land dictates the fixing of the reserve price at subsequent auction sales, but that the reserve price at the subsequent sales cannot be above the reserve price fixed for the first auction sale.

It is necessary to determine the meaning of 'reserve price'. Section 257(1)(d) of the Code provides that the reserve price is a price equal to the

A estimated market value of the land in question. Market value means the price which a willing vendor may reasonably expect to obtain from a willing purchaser. The SAR is not an expert in land valuing, and he has to study the land valuation reports put before him. He may face great difficulty when the estimated market values of the land in the valuation reports put by the plaintiff and by the defendant differ greatly. In that case he has to scrutinize the reports carefully. If one report contains, as comparison, a schedule of recent sales of lands of similar character and land-use in the vicinity of the land to be sold, and the other report does not, he may choose to accept the first report as the correct guide. But he has to exercise his discretion in fixing the reserve price judiciously which means that he has to hear the parties, and take into consideration all matters which are relevant. In fixing the reserve price for the first auction sale under s 257(1)(d) of the Code he should not take the 'forced sale value' of the land as the estimated market price because 'forced sale value' takes into account an element of compulsion to sell or to buy.

Section 259(2)(c) of the Code is expressed in clear language. It states that 'in the absence of any bid at or above the reserve price' the registrar shall withdraw the land from the sale, and direct that the land be put up for auction at a subsequent date '*either at the same or at a reduced reserve price*'. We are of the view that the 'same' reserve price referred to here, is the reserve price at the latest sale at which there had been no bidder. If that happens to be the tenth auction at which there had been no bidder, then the word 'same' refers to the reserve price at the tenth auction. The word 'same' cannot relate to the first to the ninth auctions which had been unsuccessful. Parliament, in legislating this provision, must have been aware of the futility of increasing the reserve price above that of the latest auction at which there was no bidder. At an auction sale the bid must start at or above the reserve price. It is logical, therefore, that the reserve price at the subsequent auction should either be at the same reserve price as the last unsuccessful auction, or at a reduced reserve price. It may be true that when the next auction date is fixed after a long lapse of time, the market value of the land may have increased to beyond the reserve price fixed at the last auction. If that is so, the law requires that the reserve price fixed for the next auction cannot be above the reserve price fixed for the last auction. It is then left to the bidders to push the price up when they make their bids. It must be borne in mind that where the language of the law is clear, the duty of the court is to interpret what the law is, and not what it should be.

In this case, the reserve price at the last auction was $4.63m. When considering the reserve price of the land for the next auction, the SAR was faced with a valuation report which states that the market value of the land is $5.7m, and the 'forced sale value' is at $4.02m. But the SAR had fixed it at $5m, and the learned judge had confirmed this reserve price, but gave no reasons for doing so.

Following the requirements of s 259(2)(c) of the Code, the SAR is not authorized to fix the reserve price above the reserve price for the last auction which was unsuccessful. The reserve price for the next auction should not be higher than $4.63m.

In this appeal and cross-appeal, both the learned counsel had alleged that the learned judge had not complied with the provisions of s 259(2)(c) of the Code with which we agree. Since the reserve price for the last unsuccessful auction was $4.63m, and in the light of the view we have taken of the proper construction of s 259(2)(c) of the Code, we are of the view that following the requirements of this section the reserve price of the land at the next auction should be fixed at $4.63m.

For the reasons given above, we find that the learned judge in confirming the SAR's order, had failed to construe s 259(2)(c) of the Code correctly. We, therefore, allow both the appeal and the cross-appeal, but we make no order as to costs. The deposit of $500 is to be returned to the appellant.

*Appeal and cross-appeal allowed.*

Reported by Prof Ahmad Ibrahim